No. 84-1361

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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents contend (Br. 15-28) that the time consumed by pretrial appeals is not materially different from trial court delay and that it should therefore always be counted within the length of delay relevant under *Barker* v. *Wingo*, 407 U.S. 514 (1972). In our opening brief we argued, however, that the nature of the appellate process is such that delays that would require explanation if they occurred in the trial court would routinely be justifiable as part of an appeal, and that it would therefore be inefficient — and would lead to errors such as the one committed by the court of appeals in this case — routinely to treat pretrial appeals as presumptive violations of the Sixth Amendment and then to undertake a largely standardless balancing in each case, the necessary result of the approach advocated by respondents.

We also noted (Br. 23-24 n.13) that the Due Process Clause safeguards defendants from prejudice resulting from intentional governmental misconduct and that there may be exceptional circumstances of judicial neglect that would warrant a full inquiry into whether the Speedy Trial Clause has been violated — *i.e.*, where a defendant who appears to be exposed to serious prejudice by appellate delay has been unable, despite requests directed to the court of appeals, to obtain a ruling within a reasonable time frame. In the absence of such circumstances, delays created by pretrial appeals should be conclusively presumed to comport with the Speedy Trial Clause for the reasons discussed in our opening brief (at 19-32, 35-36). In our view, this approach most faithfully implements the protections of the Speedy Trial Clause in the context of appellate delay while at the same time providing for the fair, efficient, and uniform treatment of constitutional speedy trial claims. Respondents offer no convincing reason to reject our approach.

a. Respondents claim (Br. 18-23) that appellate delay must be taxed against the prosecution because appellate courts are part of the government; they respond to our arguments based on the unique nature of the appeal process by suggesting that appellate courts should significantly alter their processes in order to decide pretrial appeals with greater dispatch. While it is of course true that it is the government as a whole that bears the responsibility to afford a defendant a speedy trial, it does not follow that delay in the appellate courts, which have different responsibilities and different decisional processes from the trial courts, should be counted against the government in the same manner as is delay at the trial level (see U.S. Br. 26). Moreover, respondents completely ignore their own passivity in the face of delay. In fact, had they desired a speedier trial, they could for example have agreed to defer their suppression claims until after trial. If respondents were

convicted, the district court could then have granted their motions following the jury's verdict; this course would have preserved their right to obtain a ruling on admissibility of the evidence, while affording them the speedy trial that they now claim to have desired all along and at the same time protecting the government's right to appeal the suppression rulings. See *United States* v. *Scott*, 437 U.S. 82, 100 n.13 (1978); *United States* v. *Ceccolini*, 435 U.S. 268, 271 (1978); U.S. Br. 24 n.13. Such relief could have been sought not only in the district court but at any time during the appeal process by means of a request to remand for trial.[1] Indeed, even at the current stage of the case, respondents have pressed their speedy trial claim as a means of avoiding or delaying trial, although its resolution could have been deferred until after trial, when such claims are "best considered" (*United States* v. *MacDonald*, 435 U.S. 850, 858 (1978)), without prejudice to them.

Recognizing that the appellate process as it has evolved in the contemporary American legal system is ill-suited to resolving disputes of any complexity with the speed that they believe is constitutionally required, respondents argue that the process should be streamlined by entering judgment shortly after argument with an opinion to follow or, indeed, forgoing preparation of an opinion altogether.[2]

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[1] Respondents' suggestion (Br. 44 n.44) that they were powerless to seek a more expeditious resolution from the court of appeals is in error. Both informal means, such as expressing to the court a desire to obtain a speedy trial, and formal means, such as petitioning for a writ of mandamus to compel a decision, are available, yet respondents chose neither. Instead, they bided their time and then, having been unsuccessful on the appeals, argued that the delay had ripened into a constitutional violation.

[2] Presumably respondents would require equal or even greater modifications of the procedures of this Court, especially since delay at this stage comes on top of the time already consumed by review in the courts of appeals. Understandably, respondents refrain from suggesting, for

While there is of course "no requirement in law that a federal appellate court's decision be accompanied by a written opinion," *Furman* v. *United States*, 720 F.2d 263, 264 (2d Cir. 1983), there is surely no warrant in the Sixth Amendment for the substantial disincentives to writing opinions in pretrial appeals inherent in respondents' submission, which would alter the nature of the appellate process with regard to pretrial appeals and deprive the legal system of an important body of precedential jurisprudence. See *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984) (noting "the benefit [this Court] receives from permitting several courts of appeals to explore a difficult question before * * * grant[ing] certiorari"). Opinion writing (in cases of sufficient importance and novelty to merit the task) is an integral part of the deliberative process of appellate courts in this country: " '[c]onclusions easily reached without setting down the reasons sometimes undergo revision when the decider sets out to justify the decision.' " P. Carrington, D. Meador & M. Rosenberg, *Justice on Appeal* 31 (1976), *quoted in* R. Stern, *Appellate Practice in the United States* 484 (1981); see also *Standards Relating to Appellate Courts* 58-61 (1977). By the same token, hastily written or ill-considered opinions could lead both to bad results in individual cases and bad precedents for future decisions. Respondents' proposed constitutional analysis would unjustifiably inhibit the process of appellate review in an important class of cases.

Moreover, it makes little sense to require an appellate court to consider, on a subsequent appeal, whether its own delay violated the Speedy Trial Clause. That question will

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example, that this Court is constitutionally required to decide pretrial criminal cases more expeditiously by dispensing with opinions or, perhaps, by collapsing the petition and merits stages into one. Yet this is the necessary implication of their argument.

normally have been answered conclusively by the prior appeal itself, for there would have been no reason for the court of appeals to render a decision (as did the court here) remanding for trial if the length of delay had in its view already surpassed that which is constitutionally permissible. The time for a defendant's complaint is while the appeal is under consideration, when the court of appeals is still able to expedite its processes if it considers that necessary in order to secure the speedy trial guarantee, not after the event when curative action is no longer possible.

b. Respondents argue next (Br. 23-25) that their right to a speedy trial outweighs the government's right to appeal. We agree, of course, that the speedy trial right is constitutional while the right to appeal is not. But this commonplace hardly requires that the latter be sacrificed to the former. To the contrary, we urge here only what the Court has consistently recognized — that the right to a speedy trial is not absolute, but rather should be accommodated with other interests of both defendants and society through a functional analysis of the circumstances giving rise to delay. See, *e.g.*, *Barker*, 407 U.S. at 519-522; *Harrison* v. *United States*, 392 U.S. 219, 221 n.4 (1968); *United States* v. *Ewell*, 383 U.S. 116, 120-121 (1966); *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905); U.S. Br. 18, 24-27, 29-31. Just as the Double Jeopardy Clause does not prevent retrial of a defendant who is successful on appeal, *United States* v. *Tateo*, 377 U.S. 463, 465 (1964), so the Speedy Trial Clause should not bar trial following an appeal.

c. Respondents urge (*e.g.*, Br. 17-18, 23-24 n.25, 26-27 n.29) that claims like theirs should be evaluated by counting appeal time within the relevant length of delay and then assessing its significance in each case by determining the reasons for the delay. They claim that this is the approach consistently followed by the lower courts. As we explained

in our opening brief (at 36-38), however, the reasons generically justifying appellate delay make respondents' approach a largely futile and wasteful inquiry that can lead tc erroneous results and inconsistent treatment of similarly situated defendants. Whether pretrial appeal time is excluded at the outset from the calculation of the length of delay (*e.g., United States* v. *Jackson*, 508 F.2d 1001, 1005 (7th Cir. 1975)) or is included and then found justifiable in light of the reasons for the delay (*e.g., United States* v. *Herman*, 576 F.2d 1139, 1145-1146 (5th Cir. 1978)), the result should be the same. See generally *Hill* v. *Wainwright*, 617 F.2d 375, 378-379 (5th Cir. 1980) (time on appeal counts within length of delay, but it "should not be attributed to the state"); see also *United States* v. *Roy*, 771 F.2d 54, 59 (2d Cir. 1985) (delay on government's pretrial appeal was " 'occasioned by the defendant' " and therefore excludable under the Interstate Agreement on Detainers Act).[3] The difference is that the latter approach turns a disturbingly large percentage of pretrial appeals into presumptive violations of the Sixth Amendment (see U.S. Br. 28) and entails application of an increasingly elaborate set of rules for evaluating the circumstances of each individual case. See *Graves* v. *United States*, 490 A.2d 1086, 1092-1098 (D.C.

[3] Respondents discount (Br. 24-25 n.27) the relevance of Congress's determination that appellate delay should be excluded under the Speedy Trial Act (see U.S. Br. 19-20) on the ground that the Act "artificially compartmentalize[s]" the period of delay. In fact, however, the *Barker* test for assessing constitutional speedy trial claims also divides the time into distinct periods and assigns different weights to them. See *Barker*, 407 U.S. at 531; see also, *e.g., Graves* v. *United States*, 490 A.2d 1086, 1097 n.12 (D.C. 1984) (separating delay into 13 parts). In any event, respondents' objection to the relevance of the Act cannot be limited to consideration of appeal time, but would apply in every case, thereby making Congress's judgments in the Act irrelevant to application of the Speedy Trial Clause, in contravention of Congress's understanding and that of the courts (see U.S. Br. 19).

1984), overruling in part *Day* v. *United States*, 390 A.2d 957 (D.C. 1978).[4]

The lower courts' approaches reflect to varying degrees an understanding, which respondents' argument fails adequately to appreciate, of the differences between appellate and trial court delay. This area of the law would best be rationalized, as we argued in our opening brief (at 19-36), by excluding appeal time from the length of delay in all but the most egregious cases. At the very least, the Court should make it clear that appellate delay must be treated significantly differently from trial delay in arriving at the balance required by *Barker* v. *Wingo, supra*. Certainly the time periods routinely considered by the courts of appeals presumptively to prejudice defendants' rights under the Speedy Trial Clause (see U.S. Br. 28) are far too short to be capable of reasonable application when the delay is due largely to a pretrial appeal.

2. Respondents argue next (Br. 28-38) that *United States* v. *MacDonald*, 456 U.S. 1 (1982), which holds that the Speedy Trial Clause does not apply to periods during which a defendant is neither formally charged nor under actual restraints, is inapplicable where, as here, the government appeals from the dismissal of the indictment. To support

[4] Despite their appearance of precision, such rules do little to resolve the basic problem -- the inconsistent, virtually standardless approaches courts take to appellate delay. It is essentially meaningless to say that certain appellate time is weighed "lightly" or "neutrally" or "significantly," when in the end the cases seem to be decided almost intuitively. Compare, *e.g., Graves*, 490 A.2d at 1091-1105, with *id.* at 1107-1115 (Ferren, J., dissenting); see also Pet. App. 15a, 17a (purporting to excuse part of the time on appeal and to weigh another part "for or against neither side," yet ultimately including both periods within the length of delay, which was considered "[t]he most weighty factor by far"). We submit that the approach set forth in our opening brief would more faithfully achieve fairness and consistency between defendants as well as serve the purposes underlying the Speedy Trial Clause.

this claim, respondents state that despite the dismissal of the charges against them and the fact that they had been released without bail, the government was still actively pursuing its case and they continued to be subject to the possibility that bail might be imposed. Their argument is contrary not only to *MacDonald* but also to the Court's other decisions construing the applicability of the Speedy Trial Clause.

The Court has consistently made it clear that when no indictment is outstanding, it is only the "*actual* restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States* v. *Marion*, 404 U.S. 307, 320 (1971) (emphasis added); see *MacDonald*, 456 U.S. at 6-9. The mere *potential* for imposition of restraints or reinstatement of the indictment in the future cannot, consistently with *MacDonald*, be viewed as sufficient to give rise to a speedy trial right. The fact relied on by respondents (Br. 32-33) that the government's desire to prosecute them was a matter of public record also is insufficient. See *MacDonald*, 456 U.S. at 9 & n.9; *Marion*, 404 U.S. at 309. Finally, whether respondents technically were listed as "defendants" or were defendants within the meaning of certain statutory provisions (Br. 31-33) cannot control their status for purposes of the Speedy Trial Clause.[5]

While the government has never abandoned its attempts finally to bring respondents to trial, the fact remains that respondents were not formally under indictment during the

[5] Nor does the fact that respondents were ordered to appear at the evidentiary hearing held on remand in the district court during the first appeal (Resp. Br. 32) -- an appearance that they waived -- constitute the sort of "actual restraints" required under the Court's precedents as a basis for application of the Speedy Trial Clause in the absence of a formal indictment. Anyone may be ordered to appear in court or, for example, subpoenaed to appear before a grand jury; but such orders do not, in themselves, hold a person to answer a criminal charge.

appeals and that they were not subjected to actual restraints on their liberty. Similarly, in *MacDonald* the investigation continued after the dismissal of charges (456 U.S. at 5, 10-11 n.12), a dismissal that was largely involuntary and therefore shared important characteristics with the district court's dismissals here (see U.S. Br. 33 n.22). This case is wholly unlike *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), where the prosecutor could have restored an indictment to the docket upon request. Here, it was not within the government's power to proceed against respondents at a time of its choosing. No charging document was in force. Surely the Sixth Amendment does not require a speedy trial for persons whom the government is unable to try at all.

3. Respondents' assertion (Br. 42-45) that they have consistently sought a speedy trial is transparently false. In our opening brief (at 43), we noted that the utterly insubstantial nature of respondents' petitions for a writ of certiorari following the court of appeals' disposition of the second appeal clearly demonstrates their manifest desire to avoid trial. Respondents' attempt (Br. 9 n.13) to justify those petitions is without merit, as indeed the court of appeals concluded. See Pet. App. 15a ("the chances of [respondents] obtaining review by certiorari were virtually nil"). KaMook Banks's position on the merits of the vindictive prosecution issue was plainly foreclosed by *United States* v. *Goodwin*, 457 U.S. 368 (1982). See Pet. App. 31a-35a. Moreover, after the court of appeals reversed the dismissal of the indictment, her pretrial vindictive prosecution claim was in the same interlocutory posture as those of the defendants in *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982), in which this Court held that the courts of appeals have no jurisdiction to consider pretrial appeals on such grounds. The petition filed by the other respondents was, if anything, more frivolous. *Hollywood Motor Car* plainly foreclosed review of the district court's denial of

their vindictive prosecution motions, and even if KaMook Banks's petition had been granted, she obviously could not have established law of the case binding on the other respondents without their participation.

Respondents' contention that they effectively asserted their right to a speedy trial also ignores the fact that they could have sought deferred resolution of their claims for suppression of evidence until after trial (see pages 2-3, *supra*); had they done so, almost four years of the delay could have been avoided.[6] We stand on our submission (U.S. Br. 40-43) that the entire record demonstrates respondents' clear desire and dedicated efforts to avoid trial and that any isolated requests for a speedy trial, made only very early and very late in the day or at times when important prosecution evidence had been suppressed, were entirely pro forma demands that cannot negate respondents' acquiesence and indeed active participation in the major part of the intervening delay. Even a brief examination of the docket sheets in this case (J.A. 38-145) shows a defense strategy bent on avoiding trial by interposing an excess of motions, many of them wholly insubstantial. To reward this effort with a dismissal under the Speedy Trial Clause poorly serves that constitutional guarantee or the administration of justice.

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[6] No doubt a little imagination is required to come up with the concept of a deferred ruling on the suppression motion as a means of avoiding trial delay while preserving the government's right of appeal. But we are confident that respondents' skilled counsel could have hit upon that idea had they dedicated even a fraction of the effort expended on preventing the trial to the goal of holding one expeditiously.

For the foregoing reasons and those presented in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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